

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH HAMMOND,
Petitioner,
v.
DEBBIE ASUNCION,
Respondent.

Case No. 2:18-cv-08788-VAP-KES

ORDER DISMISSING PETITION
WITHOUT PREJUDICE FOR
FAILURE TO PAY FILING FEE

I.

INTRODUCTION

Petitioner Kenneth Hammond (“Petitioner”) filed an undated Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the “Petition”), docketed by the Court on October 12, 2018. (Dkt. 1.) Petitioner is incarcerated at California State Prison, Los Angeles County for conspiracy to commit robbery. (Id.) Petitioner failed to comply with a Court order to pay the filing fee. (See Dkt. 14.) Thus, the Petition is dismissed without prejudice.

1 On January 7, 2019, the Court docketed a renewed request to proceed IFP,
2 dated December 17, 2018. (Dkt. 12.) This request included: (1) a declaration in
3 which Petitioner declared under penalty of perjury that he has not received money
4 from any source (including gifts) within the last twelve months (id. at 1, 3); (2) the
5 certificate of an authorized prison officer, certifying that over the past six months
6 Petitioner's average monthly balance was \$28.29 and his average monthly deposits
7 were \$34.17 (id. at 3); and (3) an inmate trust account statement report, showing
8 that Petitioner received deposits of \$55.00 and \$50.00 in October 2018 and a
9 deposit of \$100 in November 2018, but no transactions prior to October 17, 2018 or
10 after November 27, 2018. (Id. at 4.)

11 On January 16, 2019, the Magistrate Judge recommended that the renewed
12 request to proceed IFP be denied because Petitioner's inmate trust account
13 statements show recent deposits of \$50 and \$100, which were not explained in
14 Petitioner's declaration. (Dkt. 14.) Given Petitioner's average monthly balance
15 and average monthly deposits, he made an inadequate showing of his inability to
16 pay the \$5.00 fee. (Id.) On January 25, 2019, the District Judge adopted the
17 recommendation, denying the request to proceed IFP and ordering Petitioner to pay
18 the full filing fee within thirty days (i.e., on or before February 25, 2019) "or this
19 case will be dismissed." (Id.) Petitioner neither paid the filing fee nor requested
20 any form of relief.

21 III.

22 DISCUSSION

23 When a petitioner files a petition for writ of habeas corpus pursuant to
24 § 2254, the petition must be accompanied by the applicable filing fee or a request
25 for leave to proceed IFP. Rule 3(a), Rules Governing Section 2254 Cases in the
26 U.S. District Courts. The IFP request must include "the affidavit required by 28
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1 U.S.C. § 1915,¹ and a certificate from the warden or other appropriate officer of the
2 place of confinement showing the amount of money or securities that the petitioner
3 has in any account in the institution.” Id. Under 28 U.S.C. § 1914, the filing fee
4 for a habeas action is \$5.00. 28 U.S.C. § 1914(a).

5 Proceeding IFP in a habeas action is a privilege. The Advisory Committee
6 Notes to Rule 3 provide: “Since prosecuting an action in forma pauperis is a
7 privilege (see Smart v. Heinze, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be
8 granted when the petitioner has sufficient resources.” Advisory Committee Notes,
9 1976 adoption; see also Franklin v. Murphy, 745 F.2d 1221, 1231 (9th Cir. 1984)
10 (“We recognize that an indigent may not be required to pay a filing fee to file a
11 habeas corpus petition, nor be required to pay to file a civil action involving a
12 fundamental constitutional right. This court has held, however, that court
13 permission to proceed in forma pauperis is itself a matter of privilege and not a
14 right; denial of in forma pauperis status does not violate the applicant’s right to due
15 process.” (citations omitted)); Smith v. Bennett, 365 U.S. 708, 712-13 (1961)
16 (holding that a state cannot deny habeas review to indigent inmates who lack the
17 resources to pay the filing fee, but “[t]o require the State to docket applications for
18 the post-conviction remedy of habeas corpus by indigent prisoners without the fee
19 payment does not necessarily mean that all habeas corpus or other actions involving
20 civil rights must be on the same footing.”).

21 Here, Petitioner is not entitled to that privilege. Petitioner submitted two
22 inmate trust account statements, showing that he received over \$100 in deposits in
23

24 ¹ The revised IFP provisions of the Prison Litigation Reform Act (“PLRA”) do
25 not apply to habeas proceedings, however. Naddi v. Hill, 106 F.3d 275, 277 (9th Cir.
26 1997) (“Congress was clearly not concerned with habeas corpus proceedings when
27 they enacted the PLRA”); see also Andrews v. King, 398 F.3d 1113, 1122 (9th
28 Cir. 2005) (holding that the PLRA three strikes provision does not apply to habeas
petitions).

1 October 2018 and \$100 in November 2018; the statements did not show any
2 transactions prior to October 2018 or after November 2018. (Dkts. 8, 12.)
3 Petitioner’s declarations did not explain the source of this income. (Id.) Instead, he
4 declared that he received no income—a fact contradicted by his statements. (Id.)
5 Additionally, Petitioner most recently maintained an average monthly balance of
6 \$28.29. (Dkt. 12.) Because the filing fee in a habeas action is only \$5, the Court
7 assessed that Petitioner made an inadequate showing of his inability to pay the \$5
8 fee. (Dkts. 9, 14.) Petitioner was ordered to pay the filing fee on or before
9 February 25, 2019 (Dkt. 14) but failed to do so.

10 It is well-established that a district court may dismiss an action for failure to
11 prosecute, failure to follow court orders, or failure to comply with the federal or
12 local rules. See Fed. R. Civ. P. 41(b); Link v. Wabash R. Co., 370 U.S. 626, 629-
13 30 (1962); Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). Local
14 Rule 41-1 provides that “[c]ivil suits which have been pending for an unreasonable
15 period of time without any action having been taken therein may, after notice, be
16 dismissed for want of prosecution.” L.R. 41-1.

17 Thus, a district court may dismiss a habeas petition for failure to timely pay
18 the filing fee or submit an IFP application. Young v. U.S., 465 F. App’x 597, 598
19 (9th Cir. 2012) (memorandum) (district court did not abuse discretion for
20 dismissing habeas petition when petitioner did not timely pay the filing fee or
21 provide an IFP application) (citing James v. Madison Street Jail, 122 F.3d 27, 28
22 (9th Cir. 1997) (per curiam) (explaining requirements for timely filing by pro se
23 prisoner of IFP application)); Culler v. Board of Prison Terms, 405 F. App’x 263,
24 264 (9th Cir. 2010) (memorandum) (same); Scott v. LaMarque, 27 F. App’x 858,
25 859 (9th Cir. 2001) (memorandum) (affirming dismissal for petitioner’s failure to
26 comply with order to pay filing fee or show cause why he could not pay); see also
27 Lawrie v. Allison, 2011 WL 1691799 (S.D. Cal. May 3, 2011) (dismissing without
28 prejudice where petitioner failed to complete the IFP application or pay the filing

1 fee in a timely manner); Davis-Rice v. Clark, 2006 WL 1646143 (N.D. Cal. June
2 14, 2006) (same); Ulrey v. Yates, 2006 WL 3456605 (E.D. Cal. Nov. 27, 2006)
3 (same); Harris v. Yates, 2004 WL 1047975 (N.D. Cal. May 3, 2004) (same);
4 Williams v. Mayberg, 2003 WL 22519421 (N.D. Cal. Nov. 4, 2003) (same).

5 In determining whether to dismiss a case for failure to prosecute or failure to
6 comply with court orders, a district court should consider the following five factors:
7 (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need
8 to manage its docket; (3) the risk of prejudice to the defendants; (4) the availability
9 of less drastic sanctions; and (5) the public policy favoring disposition of cases on
10 their merits. See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d
11 1217, 1226-28, 1234-52 (9th Cir. 2006); Gibbs v. Hedgpeth, 389 F. App’x 671, 673
12 (9th Cir. 2010) (applying five factors in habeas proceeding); see also Dean v. LA
13 Superior Court, 2018 WL 3127421 (C.D. Cal. May 14, 2018) (applying five factors
14 where petitioner did not timely file amended petition, pay filing fee, or apply to
15 proceed IFP). The test is not “mechanical,” but provides a “non-exhaustive list of
16 things” to “think about.” Valley Eng’rs v. Elec. Eng’g Co., 158 F.3d 1051, 1057
17 (9th Cir. 1998).

18 Here, the five factors support dismissal of Petitioner’s action based on his
19 failure to prosecute this case by complying with the Court’s order to pay the filing
20 fee. The first factor—the public’s interest in the expeditious resolution of
21 litigation—“always favors dismissal.” Yourish v. Cal. Amplifier, 191 F.3d 983,
22 990 (9th Cir. 1999).

23 The second factor—the Court’s need to manage its docket—also supports
24 dismissal. Petitioner’s “noncompliance [with the order to pay the filing fee] has
25 caused [this] action to come to a complete halt, thereby allowing [him] to control
26 the pace of the docket rather than the Court.” Id. (internal quotations marks
27 omitted). Over three months have passed since Respondent filed an Answer to the
28 Petition. (Dkt. 10.) Nevertheless, this action has stalled due to Petitioner’s

1 noncompliance with the order to pay the filing fee. Petitioner’s inaction frustrates
2 the public’s interest in the expeditious resolution of litigation and the Court’s need
3 to manage its docket.

4 The third factor—prejudice to Respondent—supports dismissal. “[T]he
5 failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the
6 absence of a showing of actual prejudice to the defendant from the failure ... The
7 law presumes injury from unreasonable delay.” Southwest Marine, Inc. v. Danzig,
8 217 F.3d 1128, 1138 (9th Cir. 2000) (citing Moneymaker v. CoBen (In re Eisen),
9 31 F.3d 1447, 1451 (9th Cir. 1994)).

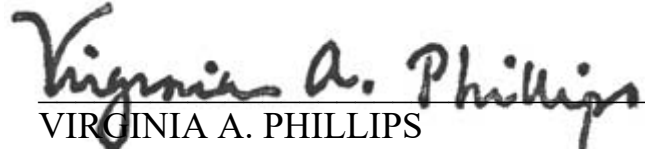
10 The fourth factor—availability of less drastic sanctions—favors dismissal.
11 Petitioner has not only failed to pay the filing fee, but he has also failed to submit
12 any other filings or correspondence (like a request for extension of time) to the
13 Court since early January—nearly three months ago. Petitioner has also been
14 provided several opportunities to file an IFP application showing his inability to
15 pay the filing fee (e.g., by explaining the source of these deposits and why this
16 income cannot go towards the filing fee). Under these circumstances, the Court is
17 unable to impose a lesser effective sanction.

18 The fifth factor—public policy favoring a disposition of an action on its
19 merits—weighs against dismissal. Pagtalunan v. Galaza, 291 F.3d 639, 640, 643
20 (9th Cir. 2002).

21 Since four of five enumerated factors support dismissal, it is recommended
22 that this action be dismissed pursuant to Rule 41(b) and Local Rule 41-1. Local
23 Rule 41-2 states that, “[u]nless the Court provides otherwise, any dismissal
24 pursuant to [Local Rule] 41-1 shall be without prejudice.” See also Fed. R. Civ. P.
25 41(b) (“[u]nless the dismissal order states otherwise,” a dismissal pursuant to
26 Federal Rule of Civil Procedure 41(b) operates as an adjudication on the merits
27 absent exceptions that are not relevant here). In general, a court has discretion to
28 dismiss an action under Rule 41(b) with or without prejudice. See Fed. R. Civ. P.

1 41(b); Al-Torki v. Kaempfen, 78 F.3d 1381, 1385 (9th Cir. 1996). Considering all
2 of the circumstances, this action is dismissed in its entirety without prejudice.

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4 DATED: April 01, 2019

5 
6 VIRGINIA A. PHILLIPS
7 Chief United States District Judge

8 Presented by:

9 
10 KAREN E. SCOTT
11 KAREN E. SCOTT
12 United States Magistrate Judge